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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,
Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
Respondent

PETITION FOR RECONSIDERATION OF ORDER DENYING WRIT OF CERTIORARI

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CHARLES DUPREE, and
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Nature of the Case Petitioner Is Asking This Court to Review: That of a seller who kept records of all business transactions; who consulted the O.P.A. before entering into the sale agreement, subject of this suit; and who sold the molasses involved in the deal at the ceiling price established by the Revised Maximum Price Regulation No. 183 prevailing at the time of the sales. This is not a "black market" case 2

First Subsequent Amendment. The first subsequent amendment to the Regulation under which Petitioner made the perfectly legal and valid sale, covers only molasses *delivered at the mill* and did not cover molasses delivered *at the mill tank* 3

Second Subsequent Amendment. The second subsequent amendment to the regulation under which Petitioner made the perfectly legal and valid sale, which amendment covers molasses *delivered at the mill* tank, was not notified to the public, and became effective August 2, 1944, after all the molasses comprised in the deal were delivered to the buyer and had been placed at the buyer's control; the purchase price had been already paid and the molasses insured at buyer's risk and expense and for the benefit of the buyer 4

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tioner's place of business. The investi[illegible]tor offerred to come back in case there was any violation, but failed to do so, in spite of the fact that the sale contract of March 3, 1944 provided for readjustment by O.P.A. officials if contrary to maximum price regulations 6

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MARIO MERCADO E HIJOS,
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PETITION FOR RECONSIDERATION OF ORDER DENYING WRIT OF CERTIORARI

To the Hon. Chief Justice and Associate Justices of the Supreme Court of the United States:

Preliminary Statement

The Petition for Certiorari was filed on June 24, 1944. The Government brief in opposition, was filed on August —, 1949. Petitioner promptly replied. On October 10, 1949, Certiorari was denied. We are moving now for a reconsideration of the denial.

Our Petition for the Writ, raises two main questions of law. The first one, relative to the power of the District Court to grant damages or penalties under Sec. 205(d) of the Emergency Price Control Act, 50 U. S. C. A. 405, is sup-

ported on seven grounds, all of them enumerated in the Petition (Pet.-index). The second one, relates to the Chandler defense and the exercise of discretion in the lower court.

The "Statement of Matter Involved," "Questions Presented" and "Reasons for Granting the Writ," appear from pages 1 to 8 of the Petition. In support of this petition for reconsideration, Petitioner now adds the following arguments:

I

It should have some significance in this case that Petitioner carries records of each and every business transaction and that this case was tried on the basis of Petitioner's records. The openness of a transaction points to its honesty.

The sale of the molasses was made by Petitioner on March 3, 1944 at 17¢ a gallon. It also appears from the record that Petitioner, before entering into the sale contract, consulted the O. P. A. "in connection with the ceiling price for sales of molasses" (Or. R. 25-6). The O. P. A. advised "the present ceiling price is the highest price charged during the base period" (Or. R. 26-6).

Under the instruction and advice from the O. P. A., Petitioner then sold its molasses at the ceiling price authorized by the Revised Maximum Price Regulation No. 183 (Pet. P. 4, quotation from the opinion of the U. S. C. A., top).

This is not, therefore, a black market case. It is that of a seller who acted under advice from the very source of the law it was supposed to obey. After obtaining the advice, the seller sold pursuant to and in conformity with the prevailing regulation (the R. M. P. R.), but because of the subsequent amendments to the regulation under which the sale was made, the seller is confronted with an action not

only for the alleged overcharge, but also for additional penalties.

II

Let us examine now subsequent amendments 32 and 45 to the R. M. P. R. No. 183, under which the Government is prosecuting this action.

The first subsequent amendment of May 9, 1944, provided for 13.6¢ per gallon of molasses, *delivered at the mill. Sales for delivery at the mill are very economical as they do not require warehousing, handling and transportation facilities.* Amendment 32 reads as follows (8 F. R. 4820):

> "Maximum price for cane blackstrap molasses sold or delivered in the Territory of Puerto Rico (b) *On or after May 9, 1944,* the maximum price for molasses shall be 13.6¢ per gallon *delivered at the mill.*" (Emphasis supplied.)

Delivery at the mill, we must emphasize, is not the same as delivery *at the mill tank.* This distinction is already settled by the cases. *Fleming* v. *Ashbough,* 158 F. (2d) 826 (C. C. A. 9th 1947). The facts and law of the *Fleming* case are as follows:

The Government sought damages from a buyer for an alleged violation of Section 1381 of the Maximum Price Regulation No. 164, which provided:

> "1381.1. Maximum prices for red cedar shingles. On and after June 29, 1942, regardless of any contract, agreement, or other obligation (a) Where the shipment originates *at the mill* rather than at a distribution yard, no person shall sell or deliver red cedar shingles, and no person shall buy or receive red cedar shingles in the course of trade or business, at prices higher than the maximum prices set forth in Appendix A, incorporated herein as 1381.1". (Emphasis supplied.)

Affirming judgment for defendant, the court stated (P. 828):

> "It is obvious from the reading of paragraph 1381.1 that the burden of proof upon the Price Administrator is to show that each of the shipments in question '*originates at the mill rather than at a distribution yard.*' This regulation fixes no maximum price *when the shipment is not from a mill, even though not from a distribution yard.*" (Emphasis supplied.)

With respect to the Administrator's contention that defendant had taken possession of the shingles on the railway cars in California, the court said (P. 828):

> "Assuming appellant's contention that these places may be deemed the shipments' origins, *shipments from railway cars are not shipments from a mill and regulation 1381.1 does not create a maximum price for the shingles.*" (E. S.)

Similarly, in the instant case, delivery at the storage tank *situated in the Guayanilla Bay, two miles away from the mill,* was not delivery *at the mill.* Amendment 32 of May 9, 1944, providing for 13.6¢ per gallon *delivered at the mill, cannot, therefore, be considered as applicable*

In anyway, by the time this first amendment to the regulation, under which defendant made the sale agreement, became effective, 887,985 gallons of the 1,250,000 involved in the deal, had been delivered by depositing them in the tank located at the Guayanilla Bay, *to be used (the tank) by the buyer as a part of the contract consideration, provided, however, that removal therefrom should be made by the purchaser before December 15, 1944* (Or. R. 12-14).

III

Let us see about the second amendment. This was amendment 45, effective on August 2, 1944. The difference between the second and the first amendment, is very sig-

nificant. The second amendment provided the 13.6¢ per gallon ceiling price, *not only for molasses delivered at the mill, but also for molasses delivered at the mill tank.* It reads as follows (9 F. R. 9248):

> "(b) The maximum price for cane blackstrap molasses shall be 13.6¢ per gallon delivered at the mill or *at the mill tank.* This is a gross price to which may be added *no additional charges for warehousing, handling, transportation from mill to mill tank,* or between mills of the same company, or for any other service or incidents of sale except that a purchaser from a mill may on resale add the actual transportation charges incurred by him in transporting the molasses *from the mill* or *mill tank* to the point at which the buyer receives delivery."

This second amendment was not notified to the public, not even by radio. (R) And it seems that it was conceived with a view to the contract of sale made by Petitioner after consultation and advise of the O. P. A. However, by the time of this second amendment, all the molasses had been delivered, paid for and were under the control of the buyer. The facts in relation to this delivery and payment are not an open question now, it having been admitted as proved (Or. R. 12-13). The stipulation by the parties covering this and other points was as follows:

> "That due to the fact that the purchaser did not have sufficient storage facilities in which to keep the subject molasses as soon as manufactured by defendant the latter agreed as part of the contract's consideration to grant the purchaser the right to keep at the latter's risk said molasses in a storage tank located at Guayanilla Bay, property of defendant to be used by Destileria Serrales, Inc., *provided, however, that removal therefrom should be made by the purchaser before December 15, 1944*" (R. 12). (Emphasis supplied.)

"That defendant pursuant to said agreement placed in a tank owned by it and situated at Peñoncillo, Guayanilla Bay, about 2 miles away from the sugar mill, the following quantities of molasses for the purchaser on the following dates:

472,438	gallons	From March 4 to March 31, 1944
321,855	"	From April 1 to April 30, 1944
93,692	"	From May 1 to May 8, 1944
177,978	"	From May 9 to May 31, 1944
184,077	"	From June 1 to June 24, 1944."

"That pursuant to the provisions of said contract defendant billed, and received payment from Destileria Serrallés, Inc., for the subject molasses, the following amounts on the following dates:

Date of Bill:	Date of Payment:	Gallons:	Amount:
March 31, 1944	April 17, 1944	472,438	$80,314.46
April 30, 1944	May 9, 1944	321,855	54,715.35
May 31, 1944	June 20, 1944	271,670	46,183.90
June 24, 1944	July 18, 1944	184,037	31,286.29
	Total	1,250,000	$212,500.00"

It is plain, therefore, that by the time of the second amendment, all the molasses had been delivered and the contract was entirely consummated, that is to say, *became a thing of the past*. The stipulation reveals that the molasses were under the custody of the buyer, insured by the buyer for his own benefit and that the seller had nothing to do any more with them. The seller facilitating of the tank to the buyer was a part of the contract consideration and because the buyer was lacking in storage facilities (Or. R. 12-13).

IV

As shown heretofore, the amendment 45 making 13.6¢ a gallon ceiling for molasses *delivered at the mill Tank*, became effective on August 2, 1944 (9 F. R. 9248). What did the O. P. A. do after putting into effect this second amend-

ment? It sent an investigator to Petitioner's business. The investigator, Mr. Vergne, contacted Mr. Mandry. He told Mr. Mandry that he thought that the contract violated the regulations of the O. P. A., but that it was the practice of the O. P. A. to get in touch with the people before filing suit. Mr. Mandry waited for the O. P. A. to come to him, *but nobody ever did.* Instead, by December 20, 1944, the Government filed suit. Mr. Mandry's testimony is as follows (R. 56):

> "X Q. Did he tell you anything about whether that contract violated any regulation of the O. P. A.?
>
> A. Well, he told me that he had seen the contract and that he thought that it violated the regulation of the O. P. A., but he said that it was the practice of the O. P. A. to get in touch with the people before filing suit.
>
> X Q. With what people?
>
> A. Well, when they found any irregularity, they would go to them and say, this has been found here, and such a thing has been done. We feel that there is something wrong here, and they give a chance to fix things up, if anything was to be done.
>
> X Q. Did the O. P. A. ever, before the complaint was filed, come to you to fix or arrange or settle that matter? ?
>
> A. *No, they never did. They filed suit.*" (Emphasis supplied.)

In connection with the failure of the O. P. A. to treat Petitioner as it treated other people, it should be remembered that the contract of March 3, 1944, after setting the 17¢ price, provided that such price (Or. R. 103):

> "*will be subject to readjustment if it shall be so determined after this date by the Defense Supply Corporation, the Office of Price Administration, or any other Government Agency, Insular or Federal, having jurisdiction over the molasses.*" (Emphasis supplied.)

It should be plain, therefore, that, if there was a possible violation, no case is better fitted for the practice of giving an opportunity to the seller to readjust than the present one. But the O. P. A. apparently was not interested in the readjustment: it was interested in suing, and in going against Petitioner *for damages and penalties.*

V

In our Petition, we deal quite thoroughly with Sec. 205(d) (50 U. S. C. A. 405). In this motion for reconsideration of the denial of the writ, we must come back to Sec. 205(d).

There is a tendency in our courts to limit the rights of individuals as against the Government in the interpretation of congressional legislation. That tendency should be reversed or modified, and this case offers a great opportunity for so doing.

Section 205(d) begins with an emphatic "no" protecting every person, subjected to our laws, from liability for damages or penalties "*on any grounds or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement or agreement thereunder,* etc." The language used in Sec. 205(d) is, therefore, wide enough to make it impossible for any court to say that actions by United States are not covered by its provisions. The *damages and penalties* to which Sec. 205(d) refers are, undoubtedly, those authorized by the Emergency Price Control Act against violators.

But Sec. 205(d) goes further: It provides that the lack of power of any court to grant damages or penalties *when the seller acts in good faith and pursuant to regulation, holds* "*notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may*

be modified, rescinded, or determined to be invalid" (50 U. S. C. A. 405).

This provision that a subsequent amendment of a regulation can be of no avail in action for damages or penalties against a seller acting in good faith and pursuant to regulation, is applicable to the Government more than to any other suitor. Why? Simply because the Government is the only one with power to amend a regulation.

VI

The Government argues that our construction would permit a violator to gain advantage from Sec. 205(d), a result—the Government continues saying—which the legislative history of that Section indicates Congress did not intend to bring about. In support of this argument, it cites Rep. 931, 77th Cong., 2d Sess.; *Bowles* v. *Franceschini*, 145 F. 2d 510 (C. A. 1); *Foster & Company* v. *Bowles*, 144 F. 2d 870 (E. C. A.). And the Government further argues that the purposes of Sec. 205(d) was to protect, against suits for breach of contract, a party whose performance was made illegal by O. P. A. regulation. But all these arguments bear no fundamental value against our contention.

In the first place, Petitioner is not arguing that Sec. 205(d) protects a violator. We are arguing that Sec. 205(d) protects a person who acts in good faith, as Petitioner did, pursuant and in conformity with regulation, as Petitioner also did. The sale of March 3, 1944 was made after consultation with the O. P. A. and in conformity with the Revised Maximum Price Regulation then prevailing. After Petitioner complied with the regulation, incurred in liabilities and acquired rights, delivered the molasses under the contract, and received payment for the molasses delivered, *then (August 2, 1944) the Government amended the regulation setting a ceiling of 13.5¢ per gallon delivered at*

the mill tank. It is because of this subsequent amendment, that Petitioner is being sued. However, the Government is not entitled to damages and penalties. Why? Because the prohibition against a territorial court holding a person liable for damages or penalties for anything done in good faith pursuant to a regulation or agreement thereunder, makes it clear that this exemption from liability holds "*notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid,*" *(supra),* and amendment 45 to the regulation under which Petitioner sold and delivered the molasses, represents the modification contemplated by Sec. 205(d) of the Act.

VII

Furthermore, why should a person who acts according to regulation be protected against a suit by another person and yet be liable in a suit from the Government? Is it that we are taking for granted that "the King can do no wrong." And, why talk against possible advantages in favor of a seller who consults the O. P. A. before making the sale, sells pursuant and in conformity with regulation and at the ceiling price then prevailing, when it is clear that a person acting with all these precautions should not be the subject of prejudice but the subject of praise?

The Government further argues that our argument amounts to an assertion that the Administrator was powerless to make a lower maximum price against sellers who had foreseen such contingency and contracted for future deliveries at the price prevailing at the date of the contract. But this is merely saying that a statute should read different from what it reads because something may happen if it reads as it does. However, the Government argument forgets that the statute protects only compliance in good faith

and that there is nothing in the record to prove that the contract of March 3, 1944 was made in bad faith. On the contrary, the fact of consultation with the O. P. A. and the fact that the subsequent amendment did not come but months later, after all the molasses had been delivered and paid for under the terms of the contract, points to the presence of good faith in making the contract of March 3, 1944, and, therefore, to the application of Sec. 205(d). *The cornerstone for the application of Sec. 205(d) is compliance in good faith with the prevailing regulation, and then, a subsequent amendment is not available in any court of the United States for the purposes of an action for damages or penalties.*

VIII

Another Government argument against the application of Sec. 205(d) is that Petitioner's interpretation brings Sec. 205(d) (50 U. S. C. A. 405) into conflict with Sec. 4(a), (50 U. S. C. A. 904(a)), which makes it unlawful, regardless of contract, to sell or deliver in violation of regulation. These—in our judgment—are complaints to be taken to legislators and not to courts.

However, if there is any conflict, Sec. 205(d), representing an exception or a proviso within the statute, should prevail (Pet. Reply Brief, p. 5-8). But who sold or delivered in violation of any regulation? Petitioner sold pursuant to regulation (R. M. P. R.) and in compliance thereto in good faith. When amendment 45 of August 2, 1944, became effective, all the molasses had been delivered under the contract and paid for by the buyer, and, besides, were under the buyer's control, insured to his benefit, etc. (Stipulation, Or. R. 12-13).

It was the O. P. A. subsequent amendment, that produced the troubles for the seller; but a subsequent amendment to a regulation pursuant to which a person acts or omits

to act in good faith, cannot be used by the Government itself (author of the amendment) in an action for damages or penalties. So is the clear and patent language of Sec. 205(d).

Conclusion

The reasons for reconsidering the denial and for granting the writ, are everywhere in the facts and nature of this case an appeal to the sense of fairness, typical of our system of justice. It is true that only a small Puerto Rican firm is involved directly in the erroneous decision, but the principles applied by the lower courts affect or concern everybody under our laws. We all know that our Congress was not altogether satisfied with the practical interpretation of the E. P. C. A. by the O. P. A. in certain cases. This is one of those cases in which an impossibility is being required of Petitioner and our only recourse now is the intervention of this Supreme Court to examine this case and determine whether Petitioner is right and whether error was committed by the courts below.

Prayer

In view of the foregoing, Petitioner respectfully prays a reconsideration of the order denying the writ of Certiorari.

San Juan, Puerto Rico, November 2, 1949.

Respectfully submitted,

BENJAMÍN ORTIZ,
CHARLES CUPRILL, and
PEDRO M. PORRATA,
Counsel for Petitioner,
P. O. Box 1224, Ponce, P. R.,
By PEDRO M. PORRATA.

CERTIFICATE OF SERVICE

Counsel certifies that on this date a copy of this petition for reconsideration was placed in the Post Office of San Juan, Puerto Rico, addressed to the U. S. Department of Justice, Office of the Solicitor General, Washington, D. C.

San Juan, Puerto Rico, November 2, 1949.

PEDRO M. PORRATA.

Certificate of Counsel

Counsel does hereby certify:

That the accompanied petiiton for reconsideration is filed in good faith, because petitioner honestly believes, and so does his counsel, that there are good legal grounds for same, and counsel does also certify that this petition is not filed for the purposes of delay.

San Juan, Puerto Rico, November 2, 1949.

BENJAMIN ORTIZ,
CHARLES CUPRILL, and
PEDRO M. PORRATA,
Counsel for Petitioner,
By PEDRO M. PORRATA.

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